TAN YU AI

v.

BESIKON JURUTERA SDN BHD

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[WINDING-UP PETITION NO: 28-131-2001]
1 OCTOBER 2002

COMPANY LAW: *Winding-up - Petition - Application for - Companies Act 1965, s. 218(1)(c), (f) and (i) - Directors acting in their own interests - Company ceased to function - Whether petition to be granted*

The executors and trustees of the estate of one Lim Gim Boon, deceased, filed a petition under s. 218 of the Companies Act 1965 to wind up the respondent company. Their application was briefly based on two grounds. Firstly, it was contended that the directors of the said company had conducted the affairs of the company to serve their personal interests and secondly, that the basis of the incorporation and formation of the company was no longer sustainable.

The respondent company then applied for stay of proceedings by way of notice of motion in light of an appeal filed before the Court of Appeal in relation to the dismissal of their earlier application by another judge of the High Court for leave for an extension of time to file an affidavit-in-opposition to the present winding-up petition.

The petitioners raised two preliminary objections against the said stay application. It was contended firstly, that the notice of motion was defective as it failed to state that the proceedings were to be stayed pending application for leave to appeal to the Court of Appeal and secondly, that the affidavit-in-support of the said application was defective as it had not been verified by the respondent but by its solicitor instead.

Held:

[1] The petitioner's first preliminary objection was upheld. The respondent company's application was defective as it failed to state that the stay of proceedings applied for related to the appeal/application for leave to appeal to the Court of Appeal. This omission raised doubts as to whether this was a *bona fide* mistake or a deliberate ploy calculated to delay the hearing of the petition proper as the respondent company

never filed an affidavit-in-opposition after the petition, coupled with a copy of the affidavit verifying the petition, was served on their company secretary. (pp 303 f, h & 304 a)

[2] The second preliminary objection was also upheld as the filing of an affidavit by a solicitor in a contentious matter was improper and rendered such an affidavit defective and of no use at all. Consequently, as the affidavit had not been deposed by an officer of the company who would have been familiar with the facts, this court could not find any special circumstances to grant the respondent company's application for stay. (p 304 c-d)

[3] As the respondent did not file an affidavit-in-opposition, the petition and the affidavit verifying the petition stood unopposed. The contents of the latter must also be taken to be true. (p 307 c)

[4] Based on the evidence forwarded by the petitioners, the respondent company having suspended their business since the death of Lim Gim Boon no longer had the intention of carrying on the business. The directors had unfairly pursued their interests above that of the company's and its members, namely the petitioners being the minority shareholders. (pp 307 h & 308 a-b)

[Application for winding-up petition ordered in terms.]

Case(s) referred to:

Government of Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***

Hong Leong Finance Bhd v. Hon Lai Weng & Ors [1987] 2 MLJ 377 ***(refd)***

Kapland Sdn Bhd v. Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2000] 4 CLJ 281 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***

Leong Poh Shee v. Ng Kat Cheong [1966] 1 MLJ 86 ***(refd)***

Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan [1996] 4 CLJ 267 ***(refd)***

Loch & Anor v. John Blackwood Ltd [1924] AC 783 ***(refd)***

Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1985] 2 CLJ 97; [1985] CLJ (Rep) 760 ***(refd)***

Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 16 ***(refd)***

United Merchant Finance Bhd v. Magpie Resources Sdn Bhd [2001] 5 CLJ 464 ***(refd)***

Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Ors [1996] 2 CLJ 353 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 169(3), 218(1)(c), (f), (i)
Courts of Judicature Act 1964, s. 73
Rules of the Court of Appeal 1994, r. 13

For the petitioners - Dominic Pillai; M/s Presgrave & Matthews
For the respondent - PK Yeoh; M/s T Tharuma & Assoc

Reported by M Maheswaran

JUDGMENT

Su Geok Yiam JC:
This is a winding-up petition (encl. 1) filed by the petitioners. The petitioners are the executors and trustees of the estate of Lim Gim Boon, deceased, and they hold 46 2/3% of the shares of the respondent company.

The petitioners filed this petition pursuant to s. 218(1)(c), (f) and (i) of the Companies Act 1965. Briefly stated, the grounds relied upon by the petitioners to wind-up the respondent company are as follows:

(i) the directors of the company have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole; and

(ii) the basis of the incorporation and formation of the company is no longer sustainable and it is just and equitable for the company to be wound-up.

The brief facts as stated in the affidavit verifying the petition (encl. 2) are as follows:

The respondent company was incorporated on 19 June 1980. The late Lim Gim Boon and Kim Seah Sdn. Bhd. purchased this company in 1988. The late Lim Gim Boon held 46 2/3% shares in the company and Kim Seah Sdn. Bhd. held the other 53 1/3. Kim Seah Sdn. Bhd. was formerly owned by the late Soon Kim Siah. The respondent company was formed principally as a private company based on the partnership of the late Lim Gim Boon and Kim Seah Sdn. Bhd. for the purpose of undertaking construction works in order to generate income for purposes of distribution of dividends to the shareholders.

After the death of Lim Gim Boon in 1997, there were no new projects tendered nor undertaken by the company. The company has ceased or suspended its business and it is a dormant company. The present directors

of the company, namely, Soon Aik Bin and Soon Aik Yong, are not managing the affairs of the company to maintain its principal purposes. Further the directors have no experience and expertise in continuing with the business of the respondent company. The directors of the company have also acted in the affairs of the company in their own interests as if the respondent company is their own and they have also acted oppressively and unfairly against the petitioners *viz*:

(1) the directors are also the directors of another company where winding up petitions have been presented and this is an indication that the directors are not capable of managing the affairs of the company profitably or to the benefit of the shareholders;

(2) the directors of the company who are also the next of kin of the majority shareholder are managing the company to their advantage in breach of their fiduciary duties to the company and the shareholders;

(3) cars were purchased by the company despite the fact that the company is not making any profit nor doing any business and the said cars were used by the directors and their families for their personal use and not for the business purposes of the company;

(4) the directors are allowing the company to be dormant as a result of which the company has been recording an operation loss for the year 2000 and the company continues to make losses as the company is no longer trading although the unappropriated profits of the company keep on increasing;

(5) the unappropriated profits are profits not realised by the company and not translated into dividends but tax has been paid on the profits and debited from the shareholders account because the unappropriated profits consist mainly of debtors who owe the company and who are persons connected to the majority shareholder and directors and the collectibility of the debts is in serious doubt;

(6) the company has a sum of RM150,000 in fixed deposits which may have already been utilised without the petitioners' knowledge;

(7) the company is controlled and managed by the majority shareholder and directors who are related and who have failed to hold statutory meetings and table the accounts pursuant to s. 169(3) of the Companies Act 1965 since the date the said Lim Gim Boon passed away. No formal meeting or AGM has been held up until the date of the filing

of the affidavit verifying petition and the accounts were all passed without the petitioners' knowledge as required under the Companies Act 1965; and

(8) the petitioners have repeatedly requested for the accounts and also minutes of meetings held but they have been kept in the dark until recently when the petitioners wrote a letter dated 6 December 2000 to make inquiries.

As a result, the mutual trust and confidence which formed the basis of incorporation have irretrievably broken down.

The respondent company did not file any affidavit-in-reply to the affidavit verifying the petition to wind up the respondent company within the prescribed time limit after service of all the relevant cause papers. Subsequently, on 31 January 2002, the respondent company filed an application *vide* a notice of motion (encl. 10) for leave to file an affidavit-in-opposition to the petition to wind up the company and to stay all winding up proceedings until the application was heard. On 4 February 2002 the application was dismissed by Kamalanathan Ratnam, J after hearing submissions. The respondent company then filed another application on 27 February 2002 *vide* a notice of motion (encl. 13) for leave for extension of time to file the affidavit-in-opposition. The second application was also dismissed by His Lordship on 8 April 2002 after upholding the preliminary objection advanced by the petitioners that there was no prayer in the application for an extension of time to file the affidavit-in-opposition.

The respondent company has appealed against the dismissal of its second application to the Court of Appeal.

On 15 May 2002, the respondent filed another application, this time for stay of proceedings *vide* a notice of motion (encl. 19). On 1 July 2002 the application came up for hearing before me. After hearing arguments by both the learned counsels, I dismissed encl. 19 with costs and proceeded with the hearing of the petition proper. I will give my reasons for doing so after I have dealt with the submissions of both the learned counsels.

The Submissions Of The Learned Counsels

Mr. Dominic Pillai, the learned counsel for the petitioner, raised the following two preliminary objections:

(1) the notice of motion is defective because it does not state that the proceedings are to be stayed pending appeal/application for leave to appeal to the Court of Appeal against the decision of Kamalanathan Ratnam, J dated 8 April 2002; and

(2) the affidavit-in-support of the application is defective because it was affirmed by the respondent's solicitor, namely, Yeoh Peng Kok, instead of by the respondent itself.

Consequently, he urged the court to allow both the preliminary objections and strike out the application for stay.

Nevertheless, the court insisted on hearing submissions from both the learned counsels on the merits of encl. (19) before ruling on the two preliminary objections in order that there should be no further delay in the hearing of encl. (19) on its merits.

The respondent counsel relied on the case of *Hong Leong Finance Bhd. v. Hon Lai Weng & Ors.* [1987] 2 MLJ 377 and argued that a stay should be allowed because the decision of Kamalanathan Ratnam J dated 4 February 2002 in respect of encl. (10) was not given after a full trial. He also relied on the ase of *Lim Kok Liam & Sons Sdn. Bhd. v. Lau Choon Wan* [1996] 4 CLJ 267 in support of his contention that a stay should be allowed if it would render the appeal nugatory.

In response the petitioner's counsel argued that both the cases concerned matters of execution and were inapplicable to the facts of the instant case which concern a petition to wind up the company.

The Findings Of The Court

In respect of the 1st preliminary objection, the court is in total agreement with the learned petitioner's counsel that the application is defective because it has failed to state that the stay of proceedings which is being applied for relates to the appeal/application for leave to appeal to the Court of Appeal. This omission is clearly reminiscent of the omission in encl. (10) to state that the notice of motion was for the purpose of obtaining an extension of time to file an affidavit-in-opposition to the petitioner's affidavit verifying the petition to wind up the company, which omission led first to Kamalanathan Ratnam J dismissing (encl. 10) and secondly to the respondent filing a second application (encl. 13) for an extension of time which was also dismissed by the same learned judge and, thirdly, to the respondent filing its appeal to the Court of Appeal.

In view of the background of this application (encl. 19) the court cannot help but wonder whether the second omission was a *bona fide* mistake in drafting or was deliberately done as a calculated ploy intended to delay the hearing of the petition proper since no affidavit-in-opposition was ever filed although the petition together with a copy of the affidavit verifying

petition was personally served on the respondent's company secretary, namely, Lik Saw Im of Allied Secretarial Services Sdn. Bhd. on 26 September 2001 and the petition was set down for hearing on 10 December 2001 and despite a postponement which was granted on that date by Md. Raus bin Sharif J to enable the respondent to file an application for extension of time to file their affidavit-in-opposition.

The second preliminary objection was also correctly raised and should also be upheld because the filing of an affidavit by a solicitor in a contentious matter is improper and renders such an affidavit defective and of no utility at all. Consequently, without an affidavit deposed by an appropriate officer of the respondent familiar with the facts in order to satisfy the court that there are special circumstances which necessitate the court granting the stay pending the appeal/application for leave to appeal to the Court of Appeal the application must be dismissed. (See the cases of *Kapland Sdn Bhd v. Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2000] 4 CLJ 281, *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181; [1985] CLJ (Rep) 575, and *Seng Huat Hang Sdn. Bhd. v. Ghee Seng & Co. Sdn. Bhd.* [1985] 2 CLJ 97; [1985] CLJ (Rep) 760.)

However, in the event that the court is wrong in up holding the two preliminary objections the court proceeded to consider encl. (19) on its merits on only one issue, that is, whether the winding-up petition should be stayed pending the appeal/application for leave to appeal to the Court of Appeal by the respondent company.

The grounds as set out in the affidavit of Yeoh Peng Kok, the respondent's solicitor, affirmed on 14 May 2002, can be summarised as follows:

(1) the respondent has filed a notice of appeal against the decision of the High Court disallowing him from filing an affidavit-in-opposition to the petitioner's affidavit verifying the petition to wind up the respondent;

(2) the respondent has merits in the appeal as Kamalanathan Ratnam J had misconstrued the 1st notice of motion because of a technical error and dismissed the notice of motion on the ground that prayer (a) did not bring to the attention of the High Court judge that the respondent was seeking leave to file an affidavit-in-opposition;

(3) the respondent is still operating and is a company which is in a sound financial position despite the economic downturn; and

(4) the respondent will suffer substantial losses if the company is wound up and the employees of the respondent will lose their employment.

The petitioners filed their affidavit-in-reply on 22 May 2002 through the 1st petitioner, namely, Tan Yu Ai, one of the two executors of the estate of Lim Gim Boon, deceased. The affidavit states as follows:

(1) the petition to wind up the company was filed pursuant to s. 218(1)(c), (f) and (i) of the Companies Act 1965;

(2) the respondents do not have strong grounds to support their application to stay the winding-up proceedings;

(3) there are no merits in the respondent's appeal/application for leave to appeal to the Court of Appeal because of the operation of the doctrine of *res judicata*;

(4) the respondent had, after the death of Lim Gim Boon, ceased construction works since 1997;

(5) there are no new projects which were tendered by or managed by the respondent;

(6) the respondent is a dormant company;

(7) the respondent does not have any profits since 2000;

(8) the respondent is in dire financial straits;

(9) there is no loss of employment because the respondent no longer has any employees; and

(10) the necessity for the respondent to apply for leave to appeal to the Court of Appeal arose out of its failure to file the notice of appeal within the permitted time frame.

It is trite law that an appeal does not operate automatically as a stay of execution. Section 73 of the Courts of Judicature Act 1964 and r. 13 of the Rules of the Court of Appeal 1994 give the judge a judicial discretion to stay proceedings pending appeal which must be exercised within the confines of the law. (See *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353.)

In my judgment, the grounds relied upon by the respondent do not constitute special circumstances. (See *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116). Neither do they constitute exceptional circumstances. (See *Leong Poh Shee v. Ng Kat Cheong* [1966] 1 MLJ 86). From the chronology of events as set out in the earlier part of this judgment the irresistible conclusion of the court is that the appeal was filed for the purpose of delaying the speedy hearing of the winding-up petition and to frustrate the petitioner's petition to wind up the respondent in order to protect and preserve for the benefit of and distribution to the beneficiaries of the estate of Lim Gim Boon, deceased, of whatever remaining assets, if any, including substantial unappropriated profits for the years 1998 and 1999 which have not been realised and translated into dividends because they consist mainly of debts owed to the company by persons connected to the majority shareholder and directors. (See *Lim Kok Liam & Sons Sdn. Bhd. v. Lau Choon Wan* [1996] 4 CLJ 267.)

Again there is an omission and I would add a glaring one at that on the part of the deponent of encl. (18) to exhibit any document, for eg, profit and loss statements, annual financial statements, audited accounts, list of names of employees, list of projects or works tendered or undertaken by the respondent, bank statements etc, as evidence in support of his averments that there are special and exceptional circumstances as to why the application for stay pending appeal should be allowed, *viz* that the company is still operating and is a company which is in a sound financial position despite the economic down turn and the company will suffer substantial losses and there will be loss of employment by its employees if the company is wound up. (See *Government of Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161 FC and *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* [1995] 2 CLJ 701 SC.)

Having dismissed the application for stay the court proceeded to hear the petition proper.

The learned counsel for the petitioners submitted that there was no affidavit-in-opposition from the respondent company. He also submitted that the petitioners being the minority shareholders of the respondent are gravely prejudiced by the way the company has been managed. Since the substratum of the company has ceased to exist, the company should not be allowed to carry on. The learned counsel for the petitioners also made an oral application to amend the prayer in para. 40(2) in encl. 1 to substitute the words "official receiver" for "official assignee" and to insert the word "provisional" before the word "liquidator". As the learned counsel

for the respondent company and the representative of the official receiver did not object to the oral application to amend the court allowed the amendment.

The learned counsel for the respondent company then informed the court that he was unable to submit in response to the petition to wind up the company as the application to stay the proceedings had been dismissed by the court and there was no affidavit-in-opposition filed by the respondent company.

In my judgment as there was no affidavit-in-opposition filed by the respondent, the petition and the affidavit-verifying petition stood unopposed. (See *United Merchant Finance Berhad v. Magpie Resources Sdn Bhd* [2001] 5 CLJ 464). The contents of the affidavit verifying the petition must also be taken to be true. (See *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609).

It is significant that the affidavit verifying petition comprises 185 pages complete with detailed particulars relating to the incorporation, shareholders and officers of the respondent company filed with the Registrar of Companies (exh. "P2"), a copy of the grant of probate to the petitioners (exh. "P3"), the Memorandum and Articles of Association of the respondent company (exh. "P4"), the CTOS Enquiry (exh. "P5"), the audited accounts of the respondent company for the years 1997, 1998, 1999 and 2000 (exh. "P6"), the draft accounts done prior to the demise of Lim Gim Boon which differ from the audited accounts for 1997 (exh. "P8"), the attendance slips for the 17th to the 20th annual general meetings showing the non-attendance of the petitioners because they were not notified of such meetings (exhs. "P8.1"), the petty cash claim for the amount of RM39,030.06 which was advanced by the deceased estate and which remains unpaid by the respondent company (exh. "P9") and the notice which the estate of Lim Gim Boon was still receiving from the finance company in respect of a Volvo car 960 belonging to the respondent wherein the deceased was a guarantor although the car has been sold and a new car bought not for the company's use but for the personal use of the two new directors.

In view of the affidavit evidence presented by the petitioners, the court is satisfied that the respondent company having suspended its business for at least a whole year if not more since the death of Lim Gim Boon, deceased, in 1997, no longer has the intention of carrying on the business. The court is also satisfied that the directors, Soon Aik Bin and Soon Aik Yong, have acted in the affairs of the company in their own interests rather than in

the interests of the members as a whole and have also acted in a manner which appears to be unfair to the other members, namely, the petitioners. The court is further satisfied that because the substratum of the company is gone and the minority shareholders have justifiably lost confidence in the management of the company by the directors because of a lack of probity in the conduct of the affairs of the company it is just and equitable to make a winding-up order. (See *Loch & Anor v. John Blackwood Ltd* [1924] AC 783, PC).

In the premises, the court granted order in terms of the winding-up petition as amended.